Supreme Court, U.S.
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No. 96-1365

In The

Supreme Court of the United States

October Term, 1996

VALERIE MILLER and VICKIE WILLIAMS, D.O.,

Petitioners,

vs.

ARLENE M. BROWN, M.D.,
and FAMILY PRACTICE ASSOCIATES, P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Dr. Brown advances two reasons why a writ of certiorari should not be granted on the first question presented, regarding the standard to be applied to the "reasonableness" criteria of section 11112(a) of the HCQIA. First, she contends that the Tenth Circuit merely "resolved an ordinary 'substantial evidence' issue." (Brief in Opp., p. 2.) Second, she contends that this case is limited to its facts and does not present an inter-Circuit conflict because the Tenth Circuit based its decision on the "reasonable effort to obtain the facts" requirement of subsection 11112(a)(2). (*Id.* pp. 1-2.) Neither reason should deter this Court from granting the writ.

Whether there was substantial evidence to support a denial of immunity depends, of course, on what standard applies to assertions of immunity under the HCQIA. Under the objective standard adopted by the Third, Fourth, Ninth, and Eleventh Circuits, the statutory presumption of immunity is not called into question by a disagreement among experts regarding the reasonableness of a review action when there is no dispute that a reasonable reviewer could have decided that the action was warranted. Under the Tenth Circuit's approach, a difference among experts is sufficient to permit a jury to reexamine the medical judgments of peer reviewers and award damages if it disagrees with the reviewers' determinations. In deciding on the sufficiency of the evidence, the Tenth Circuit expressly rejected the objective reasonableness standard as applied in the other Circuits. (App. 20-21 n.9.)

This critical issue is cast in sharp focus by the record. Dr. Lindley's opinion regarding the hospital's reliance on two cases was far from "unrebutted." (Brief in Opp., pp. 4, 8, 11.) Both defense experts testified that the restriction of Dr. Brown's privileges was justified by the cases considered by the peer reviewers. The record thus reflects conflicting opinions as to whether the hospital's fact-finding effort was reasonable. What *is* unrebutted, however, is that a reasonable physician *could* find that the risk to Dr. Brown's patients, as evidenced by the two cases reviewed, was sufficiently serious to warrant restriction of Dr. Brown's hospital privileges.[1] Whether that showing is sufficient to qualify for HCQIA immunity as a matter of law is the first of the questions presented by this case.

That question properly calls for review of the standard applicable to all three "reasonableness" criteria of section 11112(a) – the subsection 11112(a)(2) "reasonable effort" requirement as well as the "reasonable belief" provisions of subsections 11112(a)(1) and (a)(4). No court has drawn a distinction between the standard applicable to "reasonable effort" and that applicable to "reasonable belief." Nor is there a principled basis for doing so. (Pet.,

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[1] It is a distortion of the record to characterize the cases reviewed as instances in which the hospital "recognized" or admitted (Brief in Opp., pp. 2, 6) that Dr. Brown did not violate the standard of care. Because the hospital's concern was with potential harm to patients, whether Dr. Brown breached the standard in those cases was immaterial. Even Dr. Brown cannot be contending that a hospital must wait until a physician actually commits malpractice before it can act to protect patients from a foreseeable risk of injury without jeopardizing its ability to obtain immunity under the HCQIA.

pp. 19-20.) All three "reasonableness" criteria are implicated in this case, and the Tenth Circuit did not distinguish one of them from the other in its decision broadly rejecting an objective standard for HCQIA immunity. (App. 20-21 n.9.)[2] In deciding claims of HCQIA immunity, other courts have necessarily considered the "reasonable effort" requirement either under subsection 11112(a)(2) or as an element of subsection 11112(a)(4). Except for the Tenth Circuit, no court has failed to accept the judgment of medical reviewers who had an objectively reasonable basis for concluding that a review action was warranted in light of the risk revealed by the particular cases reviewed. (Pet., pp. 20-21.) The Tenth Circuit's decision is in direct conflict with four other Circuits that have considered the section 11112(a) criteria.[3]

Dr. Brown argues that the second question presented by this case, relating to the immunity for Data Bank reporting provided by HCQIA section 11137(c), also involves only a "substantial evidence" issue. (Brief in Opp., p. 12.) Again the sufficiency of the evidence depends on a prior determination of the applicable standard. Under a proper standard, the hospital's report to

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[2] Dr. Brown appears to recognize that the Tenth Circuit's analysis is equally applicable to all three of these criteria. (*See* Brief in Opp., pp. 8-9.)

[3] An objective standard does not lead to the "absolute" immunity for medical peer reviewers projected by Dr. Brown and the Tenth Circuit. (Brief in Opp., p. 11; App. 21; *see* Pet., pp. 18-19.) It does, however, provide limited immunity from damages when a review action bears the hallmarks of legitimacy that would satisfy a standard of objective reasonableness.

the Data Bank in language accurate on its face cannot be "false" and hence should be immunized as a matter of law. The question is properly joined with the question arising under section 11112(a) because, in both instances, the Tenth Circuit has misapprehended the Congressional intent underlying the HCQIA and has adopted standards for immunity that are unduly restrictive and will frustrate the vital purpose that Congress sought to achieve through this statute. There is a compelling need to reach both questions presented by the Petition.

A writ of certiorari should therefore be granted.

Respectfully submitted,

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